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No. 02-464

(3)

In The
Supreme Court of the United States

STATE OF MONTANA,
DEPARTMENT OF REVENUE,

Petitioner,

v.

FLAT CENTER FARMS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The Montana Supreme Court

REPLY BRIEF

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INTRODUCTION

Respondent's brief ignores the determining factor in this case: the taxpayer, as a corporate entity separate from its shareholders and incorporated only as a Montana state corporation,[1] is not a tribal member for purposes of federal Indian taxation preemption analysis. There is no federal authority that impliedly preempts Montana's corporate tax laws on the basis of a corporate shareholder's immunity and the reservation-based situs of corporate commercial activity. Because of the importance of the core state power of taxation, the ongoing significance of on-reservation private commercial activity, the Montana court's conflict with the Sixth Circuit Court of Appeals and the Supreme Court of North Dakota, and its clear departure from this Court's jurisprudence, this Court should accept certiorari.

REPLY ARGUMENT

1. While the Montana court relied, in part, on its own previous rulings, those decisions were based upon federal law, not on independent state law grounds. In *LaRoque v. State of Montana*, 178 Mont. 315, 583 P.2d 1059 (1978), the Montana court held *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973), controlling, concluding that state taxation of reservation Indians interferes with matters that, " . . . the relevant treaty and statutes leave to the *exclusive province of the Federal Government* and the Indians themselves." *LaRoque* at 321 (emphasis added). The court also cited to a plethora of federal case law, including *Williams v Lee*, 358 U.S. 217 (1959), and, oddly enough, *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980). It also cited other of its decisions interpreting

[1] For the tax year in question, Flat Center Farms was not tribally recognized and existed only as a Montana corporation. (Cert Pet. App. 3-4).

federal preemption of state law through the supremacy clause and Congressional plenary authority over Indians, *e.g.*, *Balyeat Law, P.C. v. Pettit*, 1998 MT 252, 291 Mont. 196 (interpreting federal preemption under *Williams v. Lee*, 358 U.S. 217, 223 (1959)). These cases demonstrate the court's acceptance of the primacy of federal law.

Respondent's recitation of Montana statutes as providing independent state law grounds for the decision below is misplaced for three reasons: (1) the Montana Supreme Court did not rely on the statutes; (2) the Montana legislature has shown its willingness to adopt state laws which protect Indian persons; and, (3) the Montana legislature has not seen fit to exempt from the corporate license tax corporations owned by Indians.

2. The Montana court has decided an important matter of federal Indian preemption law in a manner that conflicts with a ruling from a United States appellate court. That *Baraga Products Inc. v. Michigan Commissioner of Revenue*, 971 F. Supp. 294 (W.D. Mich. 1997), *aff'd,* 156 F.3d 1228 (6th Cir. 1998) unpublished opinion reported at 1998 U.S. App. LEXIS 17498, is unpublished is irrelevant to its validity. *Baraga* articulated the rule for the specific question of whether the tax exemption for an Indian shareholder may flow through to a private commercial corporate entity incorporated under state law. Its significance is in its specificity, not its presumed novelty.

Respondent omitted a critical portion of Sixth Circuit Rule 28(g) that provides in pertinent part, "If a party believes, nevertheless, that an unpublished disposition has precedential value in relation to a material issue in a case, and that there is no published opinion that would serve as well, such decision may be cited. . . . " (Resp. Brief, App. 1). Reliance on unpublished opinions is appropriate where, as here, the facts are nearly identical to facts in an unpublished opinion. *Oveido v. Jago*, 809 F.2d 326, 329 (6th Cir. 1986), n.3.

There are no material differences of fact between *Baraga*, *Airvator v. Turtle Mountain Manufacturing Co.*,

329 N.W.2d 596 (1983), and the case at bar. Both the Court of Appeals in *Baraga* and the North Dakota Supreme Court in *Airvator* concluded that shareholder privileges arising under federal Indian law do not flow to a corporate entity doing business on a reservation, a conclusion in conflict with that of the Montana court.

3. Respondent's argument for a lack of conflict between the Montana decision and this Court's rulings avoids the separate corporate identity, the fact that it was not a tribal corporation for the year in issue, and the fact that Mrs. Murray is not a member of the Fort Peck Tribes. As this Court ruled in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 160-61 (1980), the relevant inquiry for tax preemption is not whether an individual is an Indian entitled to social services on a reservation, but rather whether an individual is an enfranchised member of the body politic of the governing tribes. *Id.* at 160-61.

In conflict with this Court's rulings, the Montana court ignored the corporate identity and addressed the preemption issue as if the shareholders were the taxpayer. *Moline Properties v. Comm'r of Internal Revenue*, 319 U.S. 436 (1943). The Montana court wrongly ruled that federal law silently preempts state activity on reservations as interfering with the Indians right to make their own laws and be governed by them. (Pet. Cert. App. 6) *Nevada v. Hicks*, 533 U.S. 353 (2001) (states' jurisdiction does not stop at reservation boundary); *Cotton Petroleum v. New Mexico*, 490 U.S. 163 (1989) (no implied preemption even when state taxation reduces tribal income).

The Montana court should have conducted a particularized balancing analysis. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Cotton Petroleum v. New Mexico*, 490 U.S. 163, 173 (1989). Instead, the Montana court found that preemption must be implied; and concluded that federal law required it to disregard the corporate form and preempt state taxation of nonmembers Denise Murray and Flat Center Farms, Inc. Since the only

tribal interest of record is avoidance of state taxation, balancing the respective state, federal, and tribal interests inescapably leads to the conclusion that the state's interest in regulating and taxing its domestic corporations outweighs any tribal and federal interests. (D.C. Doc. 3; STAB Doc. 7, Ex. B; Cert. Pet. App. 29, 30).

> It can no longer be seriously argued that the Indian Commerce Clause, of its own force, automatically bars all state taxation of matters significantly touching the political and economic interests of the tribes. See *Moe v. Salish & Kootenai Tribes*, *supra*, at 481, n.17. . . . Federal statutes, even given the broadest reading to which they are reasonably susceptible, cannot be said to pre-empt Washington's power to impose its taxes on Indians not members of the Tribe. Similarly the mere fact that nonmembers resident on the reservation come within the definition of "Indian" for purposes of the Indian Reorganization Act of 1934 . . . does not demonstrate a congressional intent to exempt such Indians from state taxation. . . . Nor would the imposition of Washington's tax on these purchasers contravene the principle of tribal self-government for the simple reason that nonmembers are not constituents of the governing Tribe. . . . There is no evidence that nonmembers have a say in tribal affairs or significantly share in tribal disbursements. We find, therefore, that the State's interests in taxing these purchasers outweighs any tribal interest that may exist in preventing the State from imposing its taxes.

Colville, 447 U.S. at 161.

Here, the corporation is not an enfranchised citizen of a body politic with which the federal government has a treaty relationship. It is a fictional corporate commercial entity organized, for the 1993-1994 tax year, solely under Montana state corporation statutes.

The majority of courts that have addressed federal preemption of state taxation of reservation activities have held that federal preemption of state tax authority will not be inferred simply from factors found determinative by the Montana court. *Cotton Petroleum*, *supra*; *Yavapai-Prescott Indian Tribe v. Scott, et al.*, 117 F.3d 107 (1997), *cert. denied*, 522 U.S. 1076 (1998); *Gila River Indian Community v. Waddell*, 91 F.3d 1232 (1996). It is Montana's significant disconnect in this important area of federal law that compels the conclusion that this Court should grant certiorari.

CONCLUSION

Disputes involving the balancing of interests between the core state function of taxation and any federal and tribal interest in immunizing private commercial activities within reservations from state regulation are among the most important federalism issues this Court addresses. The Montana court's decision directly conflicts with this Court's recent jurisprudence, a decision of a United States Court of Appeals and the Supreme Court of North Dakota, and indirectly with the decisions of several federal and state courts. This Court should grant certiorari to resolve the conflict.

Respectfully submitted,

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